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Supreme Court, U.S.
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No. 92-910

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Mary Sue Davis Stowe,

Petitioner,

— against —

Junior Davis

and

Ray King, M.D., d/b/a
Fertility Center of East Tennessee,
(Third-Party Defendant)

Respondents.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did not the Court below hold that the embryos in question must be destroyed regardless of whether Petitioner wishes them to be donated to others or wishes to implant them within her own body?

II. Contrary to Respondent's assertion, does not Petitioner, under *Roe v. Wade* and *Planned Parenthood v. Casey,* possess a fundamental right in determining for herself whether she is willing to undergo pregnancy and birth for the benefit of her offspring?

III. Did not Respondent and the Court below fail to accord sufficient weight to Petitioner's undertaking of physical acts comparable in scope and burden to pregnancy?

IV. Contrary to Respondent's assertion, does not Respondent, in fact, lack any substantial liberty interest in mandating the destruction of the human embryos, and is he, in fact, not allowed to claim any rights or interests greater than Petitioners?

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Petitioner submits this Reply Brief to Respondent's Brief in Opposition to Petitioner's Petition for Writ of Certiorari.

ARGUMENT

As science and medicine moves ever forward, even the opposition in this case is at a loss to cut from the cloth of old law a suit of clothes to fit the new "In-Vitro child" of medical science. America remembers the smiling picture of Louise Joey Brown on the front of *Life* magazine as an infant in diapers, sitting on the laboratory table next to the microscope where she was first seen as a three-cell embryo, holding in her little hands the petri-dish in which she was conceived.

The opposition admits that this court has never heard and has yet to hear a case involving In-Vitro human embryos. They essentially say to the court: 'you do not need to address this — the old law suits.'

Respondent's Brief in Opposition seriously misstates the issues before the Court, and in so doing, compounds the errors of the Tennessee Supreme Court below.

Respondent and the court below commit error in their analysis of the right of privacy in three ways. First, they assume that Mary, as Petitioner, possesses no substantial liberty and privacy interest in her personal beliefs valuing the particular human embryos at issue in this case. Second, their analysis of Mary's privacy interests fails to adequately weigh her substantial bodily pain and intrusion. Third, they incorrectly accord to Respondent a greater liberty/privacy interest in the destruction of these embryos than they accord to Petitioner's liberty/privacy interest in providing, through her own womb, or through donation, for the expectation of the live birth of these human embryos.

Respondent's three errors are apparently related to their perception that the Petition is "nothing more than a desperate attempt to convince this Court" to overrule *Roe v. Wade,* 410 U.S. 113 (1973). Respondent fails to perceive that the conflict between Petitioner's desire to implant the human embryos, or donate them for implantation, and Respondent's desire that they be destroyed, poses a substantial and important question under the due process clause of the Fourteenth Amendment, and that such question is entirely severable from the issue of whether the embryos are separately protected as persons under the due process

clause. Both Respondents and the court below err fundamentally by interpreting this Court's privacy opinions as fundamentally anti-procreation, and anti-life, as opposed to truly "pro-choice." Upon analysis, it is the decision of the Tennessee Supreme Court, and Respondent's defense of that decision, that threatens this Court's precedents on women's liberty/privacy rights.

Mary Davis prays that this Court would allow her to give hope to her seven frozen embryos to which her heart has bonded as her seven children. Her love for them is that of a mother. Mary is not here to do battle with the abortion forces. It is they who have brought the subject of abortion up, not she. She simply prays that the other side permit her to do unto these little ones as they themselves would wish to be done unto if it were they in cryopreservation at the earliest beginning of their life.[1]

I. DID NOT THE COURT BELOW HOLD THAT THE EMBRYOS IN QUESTION MUST BE DESTROYED REGARDLESS OF WHETHER PETITIONER WISHES THEM TO BE DONATED TO OTHERS OR WISHES TO IMPLANT THEM WITHIN HER OWN BODY?

The Court below stated:

> "The case would be closer if Mary Sue Davis were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means. We recognize . . . the additional discomfort to which she would be subjected if she opts to attempt IVF again. Still, she would have a reasonable opportunity, through IVF, to try once again to achieve parenthood in all its aspects—genetic, gestational, bearing, and rearing.
>
> Further, we note that . . . she could still achieve the child-rearing

1. At page 18 of Respondent's Brief in Opposition, footnote 20, Respondent points to what is a typographical error in Petitioner's Petition for Writ of Certiorari. The quotation from the text of the English translation of *The Concentration Can* should, in fact, read: "*IF* God wants Mary's seven-fold hope to become children what a miracle would have thus been brought about by the judgement of Maryville." Dr. Lejeune has never presumed to know what God wants. In order to decry the whole of Dr. Lejeune's testimony, Respondent has to make use of a typographical error.

aspects of parenthood through adoption . . ." (Pet. at 59)[1]

Petitioner indicated to the trial court that she wished to implant the embryos herself. The Court of Appeals below took account of her later representation that she preferred to donate the embryos to others for implantation. Respondent's letter to this Court, previously filed as Exhibit C of the Motion to Expedite Consideration of Petition for Writ of Certiorari, and attached as Exhibit A herein, clarifies her position further. The letter states that Petitioner has "always maintained that if I couldn't donate, I would want to implant . . . myself and give my unborn children a chance to live." The letter further indicates that Petitioner at this time desires "to implant the embryos myself," with donation now the second choice. Petitioner thus clearly has always preferred implantation to the destruction of the embryos.

Respondent incorrectly argues that "Petitioner's new position is not properly before this Court." (Respondent's Brief in Opposition at p. 10.) This ignores the fact that her current position is not really new, as it is identical to her position at the trial court level, and represents an unbroken preference for personal implantation over destruction. In addition, the Tennessee Supreme Court provided a holding which covers all of the wishes and positions expressed by Petitioner during the course of this litigation. Respondent's further suggestion that Petitioner should file for post-judgment relief below due to changed factual circumstances is misplaced, given the specific holding of the Tennessee Supreme Court that Petitioner's desire to implant would not alter the result in this case. Given the uncertainties regarding the survival period of these human embryos, it is just and proper that Petitioner not be required to attempt such a clearly vain and time-consuming gesture as returning to the Tennessee Supreme Court to ask if they meant what they said. Thus, this Court may properly review the Tennessee Supreme Court's holding that the embryos in question should be destroyed despite Petitioner's consistently expressed preference for implantation in herself or another.

THIS IS NOT AN ABORTION CASE. Mary's case involves a woman's right to be allowed to implant her human embryos and give life.

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1. Citations to the Petition for Writ of Certiorari are in form of "Pet. at _____."

The forces that have allied themselves against her prayer for life insist upon treating this as a case that threatens the right of abortion, warning the court that to allow this woman to give birth to even one of her seven early children would somehow erode even the right of contraception. Since they and they alone have addressed the abortion argument in their brief, there must be a reply to it.

II. CONTRARY TO RESPONDENT'S ASSERTION, DOES NOT PETITIONER, UNDER *ROE V. WADE* AND *PLANNED PARENTHOOD V. CASEY,* POSSESS A FUNDAMENTAL RIGHT IN DETERMINING FOR HERSELF WHETHER SHE IS WILLING TO UNDERGO PREGNANCY AND BIRTH FOR THE BENEFIT OF HER OFFSPRING?

Respondent's Brief in Opposition, and the Decision below, are based upon the erroneous view that Petitioner has no substantial privacy interest in valuing these particular human embryos. Thus, Respondent refuses to view Petitioner's irreplaceable valuation of these human embryos as relevant to her privacy claims, but views them as only relevant to her claim that human embryos are constitutional persons. (See Respondent's Brief in Opposition at p. 11, 20-21) The Decision below similarly assumed that Petitioner suffered no substantial damage to her privacy interests, so long as she had other means available for procreating additional children, whether biologically or through adoption. (Pet. at 58-59)

Roe and *Planned Parenthood v. Casey,* 112 S.Ct. 2791 (1992), however, indicate that the woman's right to determine for herself the valuation of her offspring is at the center of her liberty and privacy rights. Thus, this Court in Casey stated that Roe forbids forced abortions, 112 U.St. at 2811, and characterized the woman's liberty as a "right to terminate or continue her pregnancy." 112 S.Ct. at 2818. This Court upheld a state law requiring women to be offered information on the gestational age and characteristics of her unborn child precisely because "most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision." 112 S.Ct. at 2823. Thus, a statute providing women with information about her offspring was constitutional because it was "calculated to inform the woman's free choice," *id.* at 2820, and "facilitates the wise exercise of that right." *id.* at 2826.

It is therefore at the core of a woman's liberty that she be allowed to

determine, for herself, the valuation she places on her offspring, and then determine whether that valuation is high enough such that she is willing to bear the burdens of continued pregnancy.

Petitioner has made a very similar value judgment. She has determined that her offspring are so valuable to her that she is willing to have them implanted within her, and so bear the burdens of pregnancy. This personal evaluation by a woman that she values her offspring cannot possibly endanger Roe, as it lies at the heart of Roe. Indeed, it is the decision below that endangers Roe, by forcibly and through state action mandating the destruction of Petitioner's offspring. For Petitioner, this has the same effect as a forced abortion, in the sense that it subjects her to the "devastating psychological consequences," *Casey,* 112 S.Ct. at 2823, that would accompany the knowledge that the state has in effect destroyed the offspring she has chosen to implant and carry to term.

The Tennessee Supreme Court held that Petitioner lacked any substantial liberty/privacy interest in providing for the continued life of her offspring so long as she had any other reasonable means of procreating, including undergoing further rounds of IVF or adoption. Moreover, the Tennessee Supreme Court specifically stated that the result would be the same, regardless of whether Petitioner wished the embryos donated for implantation by another, or wished to implant them herself. In either instance, the embryos would be destroyed so long as Petitioner could biologically or through adoption become a parent. (Pet. at 58-59) Under this reasoning a state could require a woman to abort one child so long as they later permitted her to adopt another. *Roe* and *Casey,* of course, stand for the opposite proposition, that a woman can stand against the state and choose to value *a particular embryo or fetus,* and have that valuation respected, regardless of her ability to later bear or adopt additional offspring.

The greatest struggles that are fought in human history are fought not on the battlefield but in the hearts and minds of men. If a mother is to have the constitutional right to end the life of her preborn child, the same law must give her the choice to protect, shelter, and give life to her child, as Mary Davis in this case desires an opportunity to give life to her children.

III. DID NOT RESPONDENT AND THE COURT BELOW FAIL TO ACCORD SUFFICIENT WEIGHT TO PETITIONER'S UNDERTAKING OF PHYSICAL ACTS COMPARABLE IN SCOPE

AND BURDEN TO PREGNANCY?

Petitioner has, in the course of her efforts to bear a child subjected herself to physical acts comparable in scope and burden to pregnancy. The Court below described these efforts as follows:

> "(During 1980) Mary Sue became pregnant but unfortunately suffered an extremely painful tubal pregnancy, as a result of which she had surgery to remove her right fallopian tube. This tubal pregnancy was followed by four others during the course of their marriage. After her fifth tubal pregnancy, Mary Sue chose to have her left fallopian tube ligated, thus leaving her without functional fallopian tubes by which to conceive naturally. The Davises attempted to adopt a child but, at the last minute, the child's birth mother changed her mind about putting the child up for adoption. Other paths to adoption turned out to be prohibitively expensive. *In vitro* fertilization became essentially the only option for the Davises to pursue in their attempt to become parents.
>
> As explained at trial, IVF involves the aspiration of ova from the follicles of a woman's ovaries . . . Beginning in 1985, the Davises went through six attempts at IVF, at a total cost of $35,000, but the hoped-for pregnancy never occurred. Despite her fear of needles, at each IVF attempt Mary Sue underwent the month of subcutaneous injections necessary to shut down her pituitary gland and the eight days of intermuscular injections necessary to stimulate her ovaries to produce ova. She was anesthetized five times for the aspiration procedure to be performed. Forty-eight to 72 hours after each aspiration, she returned for transfer back to her uterus, only to receive a negative pregnancy test result each time.
>
> The Davises then opted to postpone another round of IVF until after the clinic with which they were working was prepared to offer them cryogenic preservation . . . (O)n December 8, 1988, the gynecologist . . . was able to retrieve nine ova for fertilization . . . After fertilization was completed, a transfer was performed as usual on December 10, 1988 . . . Unfortunately, a pregnancy did

not result from the December 1988 transfer . . ." (Pet. at 35-37)

These undisputed facts, as described by the Court below, indicate that Petitioner has undergone an extensive degree of physical pain and physical intrusion, and that these efforts are far greater than any made by Respondent. Indeed, the general imbalance in physical effort, pain, and intrusion between Petitioner and Respondent mirrors in many respects the parallel imbalance between a pregnant woman and her mate. Under these circumstances, the Tennessee Supreme Court's decision to order the destruction of these human embryos over the objections of Petitioner violates the rationale of *Roe,* under which a woman's greater interest in bodily integrity gives her the constitutional authority to determine the fate of the couple's offspring. Thus, this Court recently recognized that the woman's right to abort or carry the child to term derives in part from the right of bodily integrity, *See Casey,* 112 S.Ct. at 2810, 2824, and that this aspect of *Roe* is directly applicable to conflict between spouses over the fate of their offspring. *See id.* at 2830.

Petitioner undertook the painful and intrusive physical efforts described above as a joint effort, with her then-husband, the Respondent. She bore the far greater physical burden in this effort, just as a woman who procreates through natural means bears the greater burden. Under these circumstances, "as between the two, the balance weighs in her favor." *Casey,* 112 S.Ct. at 2830 (quoting *Danforth,* 428 U.S. at 71). The Tennessee Supreme Court's holding that the woman and man, despite this imbalance of physical intrusion, pain, and effort "must be seen as entirely equivalent gamete-providers," (Pet. at 54) and that the man's desire to destroy these embryos outweighs the woman's desire that they be implanted and born, clearly violates the rationale of Roe and its progeny.

IV. CONTRARY TO RESPONDENT'S ASSERTION, DOES NOT RESPONDENT, IN FACT, LACK ANY SUBSTANTIAL LIBERTY INTEREST IN MANDATING THE DESTRUCTION OF THE HUMAN EMBRYOS, AND IS HE, IN FACT, NOT ALLOWED TO CLAIM ANY RIGHTS OR INTERESTS GREATER THAN PETITIONER'S?

The Court below not only slighted Petitioner's fundamental rights to value her offspring, but also improperly ascribed a fundamental status to Respondent's desire to have the human embryos destroyed. This Court

has never ascribed to anyone but a pregnant woman a fundamental right to destroy their own genetic offspring. From the beginning, this Court has noted that the destruction of the embryo or fetus involved in abortion makes the "situation . . . inherently different from" other non-destructive privacy interests. *See Roe,* 410 U.S. at 159.

It is, therefore, clear that the Tennessee Supreme Court's holding that Respondent possesses a fundamental right to destroy his offspring goes far beyond anything granted in *Roe.* Respondent has not suffered any of the "physical constraints," or pain, of either Petitioner or a pregnant woman. To extend destructive rights beyond that already granted in *Roe* would be to misapply an already controversial precedent. It would be particularly inappropriate to misapply *Roe* to Petitioner's disadvantage, given that she is a woman who has endured anxieties, physical constraints, and pain comparable to natural pregnancy. Moreover, Petitioner's privacy/liberty interest in procreating, and in protecting her genetic offspring, falls well within the rationale of long-standing privacy precedents. *See, e.g. Meyer v. Nebraska,* 262 U.S. 510 (1925); *Skinner v. Oklahoma,* 316 U.S. 535 (1942); *Santosky v. Kramer,* 455 U.S. 745 (1982). Under this Court's precedents, then, Petitioner's liberty/privacy interest in procreating and in protecting her offspring must necessarily outweigh Respondent's interest in insisting on their destruction.

Petitioner does not deny that Respondent has a fundamental right not to procreate. Respondent, however, instead exercised his fundamental right to procreate, and agreed with Petitioner that she would undertake extensive physical efforts, intrusions, and pain to create the embryos at issue in this case. Under these circumstances, Petitioner's preference that the embryos be implanted must prevail.

Respondent cites *Eisenstadt v. Baird,* (Respondent's Brief in Opposition at p. 23) for the proposition that death of Mary's children in vitro be chosen:

> "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." [Eisenstadt v. Baird, 405 U.S. at 453 (1972)]

They fail to recognize this supports Petitioner's and not Respondent's position. Respondent made his decision to beget (beget being defined as: "procreate as a father") a child when he entered consensually and expectantly upon the in vitro procedures with Mary, then his wife. Petitioner now desires to "bear" her child.

Dr. Jerome Lejeune is in tune with the symphony of life. The opposition belittles this genteel dean of world geneticists, attempting to make him appear as an outsider from Paris, who comes to this country and disputes a local organization of 10,000 in vitro physicians who have established their own "ethical guidelines". Indeed, the Supreme Court of Tennessee cites the "ethical guidelines" of the American Fertility Society's Ethics Committee in its June 1990 report as though it were positive law, making it the law of the State of Tennessee by reference and incorporation:

> "The only other dispositions suggested by the American Fertility Society's Ethics Committee in its June 1990 report, cited in the opinion, would be donation of the pre-embryos for approved research or their discard. Of course, donation for research would require the consent of both Mary Sue Davis and Junior L. Davis. If they cannot agree on this alternative, Dr. King's only other choice is to discard the pre-embryos in question." (Respondent's Brief in Opposition at A-3)

It is of note that the trial court below found ". . . there is no such term as "pre-embryo; that to use the term in the context of this case creates a false distinction, one that does not exist. The Court finds and concludes that the seven cryopreserved entities are human embryos." (Pet. at 77; see also Pet. at 72)

The new science of In-Vitro fertilization has given us 20,000 in-vitro children in the United States at present. (Pet. at 33)

The Court must speak. It cannot keep silent and leave in limbo 20,000 human embryos. The Court must speak before the number grows to 200,000 and then maybe to millions.

CONCLUSION

For the first time in history a mother is requiring the inalienable rights: life, liberty and pursuit of happiness.

Life is requested for her seven expectancies (the frozen human embryos), legitimately begotten during matrimony, and conceived in vitro with the informed consent of the father, then her husband.

Liberty is requested so that she will be free from unwarranted intrusion in her desire to offer the warmth of her love to her frozen embryos. In her bonding to them, she calls them her children, as did this Court in stating the right of privacy whether to bear or beget a child. (See Eisenstadt v. Baird, 405 U.S. at 453 (1972)

Pursuit of happiness is requested for this mother so that she will be allowed to fulfill her greatest expectation: giving to the flesh of her flesh the shelter of her own womb.

To these rights, the Respondent oppose a disputation about conception, propose a discrimination between embryos and pre-embryos, and argue about abortion, where pursuit of life is at stake. Indeed, this Court will sovereignty decide whether these matters should be pondered in relation to this case. But, it is precisely this prerogative that the opposition tries to deny to this Court.

Respondent speculates that rejection of this Petition for Writ of Certiorari be equivalent to a condemnation without judgment, by the tacit confirmation of the terrible disposition: "donation of the embryos for approved research or their discard." (See Supplemental Appendix to Petition for Writ of Certiorari at p. 4)

This case has been repeatedly compared to the judgment of Solomon, and we are today at the acme of the tragedy. The sword of the soldier is ready to execute the deadly order and the mother is kneeling imploring pity from the highest authority of the nation.

The wisdom of Solomon was to understand the cry of a mother sobbing her heart. So are we confident this Court will render supreme justice to this mother, imploring the right of becoming expectant of her own progeny.

Respectfully submitted,

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EXHIBIT A

Ray King, M.D., d/b/a
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(Third-Party Defendant), Respondents.

TO: THE UNITED STATES SUPREME COURT

I wish to impress upon the court my position in the above case. In 1989, my only position was that of wanting to become a mother by use of the seven embryos and protecting my unborn children against destruction. After careful thought and heartache, I concluded that donation would be in the best interest of the unborn children. When born, they would not have to live their life in the press spotlight and be teased and ridiculed by other children. Being born to another couple would let them grow up in a normal family. This was the hardest decision I have ever made in my life. For a woman to give up her children for their own good when she remains childless is not an easy decision. This was not a selfish decision or one to say I didn't want to implant them myself and give my unborn children a chance to live. Every mother in the world has a right to protect her own children.

With the decision of the Tennessee Supreme Court and their desire to destroy what I have suffered dearly for and their desire to destroy the life that has already been created, I beg the court to understand my decision again to implant the embryos myself so my children will have a chance at life. Together, as a family, we will endure any hardships that may arise. Second, I request permission to donate the embryos for use by another couple should I become physically unable to bear children. For the Tennessee Supreme Court to make a decision for destruction or donation to research is even against the policies of the fertility center. They too will not destroy the embryos that have already been created. Their policy is to donate unused embryos to other couples.

I request the United States Supreme Court take my beliefs and desires into consideration in their decisions.

Mary S. Stowe

Mary S. Stowe